IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1162

JONES TRANSFER COMPANY, CENTRAL TRANSPORT, INC. AND U.S. TRUCK COMPANY, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

No. 77-1189

THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE,

Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC. IN OPPOSITION

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DATED: March 17, 1978

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Respondent, Southern Motor Carriers Rate Conference, Inc., files this brief in opposition and prays that the petitions for a writ of certiorari to the United States Court of Appeals for the Third Circuit to review the judgment and opinion of that court entered in this proceeding on December 29, 1977, be denied.

STATEMENT OF THE CASE

It will be helpful to have a broader overview of the decision of the Commission and the regulations resulting than that provided by the petitioners in their statements of the case.

This proceeding involves judicial review of regulations promulgated by the Interstate Commerce Commission pursuant to rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. § 553.

The Commission prescribed uniform nationwide rules to apply to practically all shipments governing detention of vehicular equipment of motor common carriers on the premises of shippers and receivers of freight. The primary purpose was to get away from the existence of varying rules and regulations prevailing from region to region and from carrier to carrier now found to provide opportunities for abuse and discrimination. (33a; 34a)

Two basic rules were prescribed: one for detention of vehicles with power units and the other for detention of vehicles without power units. Both rules provide for free time according to the characteristics of the shipment, after which charges will begin to run if the equipment has not been released. (154a-161a)

Substantial distinction is made between detention of vehicles with power units and vehicles without power units. Where the power units are detained, the carrier's driver is also detained and therefore the free time is much shorter and the charge much higher. The distinction is designed to give the carriers and shippers and

receivers flexibility in working out an arrangement whereby the power unit and the driver may be freed up quickly, leaving the trailer available for more convenient loading or unloading. The latter practice is referred to as spotting or dropping of trailers. Free time is also allowed where equipment is detained without power, after which charges begin to accrue. (61a-78a)

For the first time, in both rules the Commission requires the carriers to enter into a prearranged schedule for arrival of the vehicle for loading or unloading, departure from which will accord prescribed relief to the shipper or receiver. (37a-38a)

Detention charges are assessed as an incentive for shippers or consignees to release carrier equipment promptly. The charge is designed both to compensate the carrier for being unable to use its equipment and to penalize the shipper or receiver for undue or unreasonable detention of the equipment as an incentive for quicker release. (52a)

The primary challenge to the prescribed rules concerns whose responsibility it is to switch trailers which are left without power between holding yards on the one hand and loading or unloading platforms on the other. Holding yards are areas on or near the shipper's or receiver's dock which are used as temporary parking for either empty or loaded trailers awaiting the opportunity to be moved into position for loading or unloading. The carrier will spot or drop trailers within the holding yard and then the trailers must be switched to or from the loading or unloading platform as the shipper's or receiver's needs dictate.

The Commission determined that problems with prompt unloading were usually attributable to the receiver and that the use of holding yards at destinations for loaded trailers awaiting unloading primarily benefits the receiver and not the carrier. On the other hand, it determined that in the situation where empty trailers are dropped at the origin, the greater benefit may often be to the carrier. Therefore, different provisions were prescribed as regards the carrier's responsibility for switching the empty trailers versus the loaded trailers. Where the primary benefit is to the carrier in dropping empty trailers, the carrier is to be responsible for the later switching of the empty trailer from the holding yard to the loading dock. On the other hand, in the case of loaded trailers awaiting unloading where the primary benefit is to the receiver, it is the receiver who must assume the responsibility for switching the loaded trailer to the dock for unloading. (140a-142a; 167a-170a)

It is important to understand that the provisions for detention of vehicles without power, the practice of spotting or dropping of trailers, is optional and not forced upon the shippers or receivers. The free time provisions under the rule governing detention of vehicles with power units, together with the provisions for prearranged scheduling, are designed to accommodate either loading or unloading within a reasonable time without any detention charges. The question of who is to switch the trailers arises only when the shipper or receiver opts for reasons of their own to establish holding yards away from loading or unloading docks. (168a-169a)

The Third Circuit Court was persuaded that there

is a rational basis for the I.C.C. conclusions and it denied the relief sought in the petitions for judicial review.

ARGUMENT

There Is No Conflict With Applicable Decisions Of This Court

The petitioners contend that the Third Circuit has "misconceived and misapplied" the decision of this Court in *United States v. Allegheny-Ludlum Steel Corp.* 406 U.S. 742 (1972). They assert that the Third Circuit has applied an unduly restricted scope of review.

A fair reading of the opinion of the court shows that it understood and properly applied the correct standards for judicial review.

The court was mindful that it was reviewing the Commission's exercise of its rulemaking authority, a wholly legislative function.

The court stated in the opening paragraph of the opinion:

> Because we are persuaded that there is a rational basis for the I.C.C. conclusions, we will deny the relief sought in the petitions for review.

The court proceeds to review the lengthy rulemaking proceedings before the Commission and summarizes generally the provisions of the rules and the contentions of the parties.

The petitioners characterize the opinion of the Third Circuit incorrectly. The opinion does not in-

dicate that the Court felt barred from meaningful inquiry as a reviewing court. The Third Circuit did not fail to make a searching and careful inquiry.

The Third Circuit started from the standard for judicial review set forth in the Administrative Procedure Act, 5 U.S.C. § 706(2)(a). It noted that the reviewing court shall hold unlawful and set aside agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. From that starting point it observed:

> But we do not write on a clean slate in fashioning a construction of what is arbitrary and capricious in the context of reviewing I.C.C. *rulemaking* functions.

Next, it quoted the standard of judicial review expressed by this Court in *Allegheny-Ludlum*. True, the the Third Circuit characterized this standard as one that "severely limits the extent of judicial review." It seems apparent from the decision of this Court in *Allegheny-Ludlum* that the characterization is accurate; yet certainly not barring meaningful inquiry nor nullifying the judicial role in the reviewing process. The Third Circuit did not see itself barred from meaningful inquiry nor did it see its role nullified. To the contrary, it announced at the outset that it was persuaded that there is a rational basis for the I.C.C. conclusions.

In *Allegheny-Ludlum* this Court recited the well established standard for judicial review found in prior decisions of this Court:

> We do not weigh the evidence introduced before the Commission; we do not inquire into the wisdom of

> the regulations that the Commission promulgates, and we inquire into the soundness of the reasoning by which the Commission reaches its conclusions only to ascertain that the latter are rationally supported.

The above standard applies to judicial review of actions of the Commission in general. This Court mentioned in *Allegheny-Ludlum* that as to the Commission's rulemaking authority, wholly legislative in nature, the Commission is limited to establishing a reasonable rule. If rationally supported, the Commission must be upheld. The Third Circuit was so persuaded.

After observing the standard for judicial review cited in *Allegheny-Ludlum*, the Third Circuit observed in passing that it might have been "receptive to some of the arguments" presented by the petitioners were it able to utilize a more expansive notion of what is "arbitrary, capricious, and an abuse of discretion." It did observe, also in passing, that the I.C.C.'s discussion of some of the points raised by the petitioners "was, at best, laconic." The latter is not a term of derogation. The use of a few words and conciseness is often a virtue. It cannot be inferred from these passing comments that the Third Circuit felt barred from meaningful inquiry or that its role was nullified. It cannot be inferred that the Third Circuit would have under any circumstances reached a different conclusion from that of the Commission.

As was the situation in *Allegheny-Ludlum*, this proceeding was governed by the provisions of 5 U.S.C. § 553 of the Administrative Procedure Act and the

following from page 758 of *Allegheny-Ludlum* is equally applicable here:

> This proceeding, therefore, was governed by the provisions of 5 U.S.C. § 553 of the Administrative Procedure Act, requiring basically that notice of proposed rulemaking shall be published in the Federal Register, that after notice the agency give interested persons an opportunity to participate in the rulemaking through appropriate submissions, and that after consideration of the record so made the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. The "Findings" and "Conclusions" embodied in the Commission's report fully comply with these requirements, and nothing more was required by the Administrative Procedure Act.

Petitioners have not shown that the opinion of the Third Circuit is in conflict with applicable decisions of this Court. Neither have they shown any other reasons for granting a writ of certiorari (Rule 19).

The Commission Decision Is Supported By The Facts And The Law And Has A Rational Basis

The Commission initiated this proceeding in 1973 when it opened the rulemaking process for comments from interested parties. (17a-18a) It received responses from 69 parties or representative groups expressing their views and opinions on the proposed uniform detention rules. (81a-83a) The Commission carefully studied the data presented by all interested parties and in 1976 issued its initial decision, some 118 pages long. (16a-134a) The regulations adopted in this initial decision were altered considerably from the first pro-

posed rules in light of the statements and responses received by the Commission. (80a) The Commission then received petitions for reconsideration of its initial decision and in 1977 issued a second decision of 30 pages that further modified the rules to reflect meritorious views and positions of the parties. (135a-164a)

Throughout the entire proceedings, petitioners were parties to the rulemaking process and actively participated. The arguments of petitioners to this Court are in essence the same arguments that were put before the Commission and the Third Circuit. Petitioners are now attempting to convince this Court to reconsider their arguments and to substitute this Court's judgment for that of the Commission. It is well settled that this Court will not substitute its judgment for that of the Commission, *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974) and other legion cases.

Petitioners attack the provision regarding spotting in holding yards, contending that the rule improperly shifts a "traditional" duty performed by the carriers to the shipper or receiver. They contend that the Commission promulgated this rule without rational explanation or reasonable basis. They choose to ignore the Commission's well-reasoned explanation of the rule set forth in its decision. The Commission substantiates the need for the rule and answers these same arguments. (46a; 140a-142a; 165a-170a)

Petitioners contend that the practice of spotting and the use of holding yards are for the mutual benefit of carriers, shippers and receivers. The Commission recognized that origin detention and destination detention

are distinct issues. (140a-141a) Each serves a separate and distinct purpose for the carriers and for the shipper or receiver. In origin detention, it is most often a convenience for the carrier to drop an empty trailer for loading. The carrier may not have a facility of its own within the area and if the shipper provides a holding yard for dropping empty trailers, the carrier is able to keep sufficient equipment within close access to the shipper's facility until needed. The Commission properly considered this type of holding yard arrangement as primarily beneficial to the carrier. Therefore, in the rule the carrier has the responsibility for switching an empty trailer to the shipping dock for *loading*. The only time this arrangement is negated is when the shipper specifically directs the carrier to place an empty trailer on its yard at a designated site. If the shipper so directs, the placing of the trailer is then for the benefit of the shipper and once the trailer is placed at the designated site, the carrier has no further obligation until the trailer is loaded and ready for pickup (140a-142a; 168a)

In destination detention, the situation is quite different. When a loaded trailer arrives at destination the receiver has an election. He may arrange for the trailer to be unloaded immediately; or he may place the loaded trailer within a holding yard to await unloading at a later convenience. The carrier receives no benefit from having a loaded trailer located within the holding yard for an indeterminate length of time. The holding yard at destination is for the sole benefit of the receiver. (168a) The carrier would be perfectly willing to immediately unload and remove the trailer from the premises; but when prevented from doing so by either an overcrowded unloading facility or by the particular

needs of the receiver, then it is the receiver that directs the carrier to place the trailer within its holding yard and the receiver which benefits. The switching of the trailer between the holding yard and the unloading dock should rightfully be the responsibility of the receiver since he is the one benefiting. He is in effect using the carrier's trailer for warehousing his goods. The Commission answered petitioners' arguments at length in its decision. (168a-169a)

The Commission included in the detention rules a provision that the carrier will work with the receiver to provide a prearranged delivery schedule without additional cost to the receiver. With such prearranged scheduling, the receiver should be able to prevent any backup at its unloading point. (144a; 169a) If the receiver does not wish to assume responsibility for switching the trailers to and from the holding yards, he may utilize "live delivery" with prearranged scheduling.

Petitioner National Industrial Traffic League contends that the Commission arbitrarily set the amount of the detention charges without considering the actual cost to the carriers for detention of their equipment. In its initial order, the Commission correctly concluded that cost was a factor to consider, but only a secondary factor. (52a-53a) The main purpose of a detention charge is to act as a penalty to encourage the receiver to quickly release carrier equipment. Therefore, even though cost may be a basis of determining reasonableness, the actual cost may not be high enough to provide a sufficient inducement. The District of Columbia Circuit has stated:

> Detention charges have a double purpose, one of which is to secure compensation for the use of a car, ship or vehicle. The other is to promote efficiency in the operation. *American Export-Isbrandtsen Lines, Inc. v. Federal Maritime Commission*, 444 F.2d 824, 829 (D.C. Cir. 1970).

In this case the Commission set a charge that it felt would compensate the carrier and still provide sufficient inducement for quick release of carrier equipment. (138a) The fact that the charge was set at a rate above the actual cost is not a proper basis for overturning the Commission decision.

Petitioners contend that the Commission is venturing into a new area and forcing upon shippers and receivers new burdens. This is not the case. (145a; 170a) The Commission is placing the responsibility for detention with the one who controls the detention and is most benefited by a particular practice. The Commission addressed the issue of burden of proof in detail and adequately substantiated its conclusions in fact and in law. (145a; 170a) The Commission has acted in the past to promote prompt and efficient transportation service through the use of detention charges and prescribed rules governing detention. (28a) *Detention of Motor Vehicles — Middle Atlantic & New England*, 344 I.C.C. 333 (1973); *Segregation of Freight, New England & Middle Atlantic States*, 335 I.C.C. 239 (1969); *Detention of Motor Vehicles — Middle Atlantic & New England*, 325 I.C.C. 336 (1965); *Middle Atlantic Conference v. United States*, 353 F. Supp. 1109 (D.D.C. 1972). In this case, the Commission has imposed obligations upon the shippers and receivers in order to ensure that the public transportation needs

will be met by increasing carrier efficiency. This is not the first time this type of action has been taken. The shippers and receivers are not subject to Commission regulation; but the carriers are. By limiting the carriers' duty and ability to perform spotting and switching operations, the Commission has properly made the shippers and receivers responsible for moving and switching trailer equipment when such movement is solely for the benefit of the shipper or receiver. The uniform nationwide detention rules will ensure that all shippers and receivers, regardless of their size, will receive fair and equal treatment.

CONCLUSION

The Petitions for Writ of Certiorari should be denied.

Respectfully submitted,

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DATED: March 17, 1978